(3)

No. 04-1126

IN THE

Supreme Court of the United States

HOWARD MCDOUGALL, ESTATE OF ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH and RONALD J. KUBALANZA,

Petitioners,

v.

C.C. MID WEST, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

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PETITIONS' REPLY MEMORANDUM

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REASONS FOR GRANTING THE WRIT

Respondent suggests in its Response that this Court lacks jurisdiction over the decision of the Michigan Supreme Court and further that its claims are not preempted because it alleges that the claims themselves have nothing to do with plan administration and plan interpretation. Contrary to Respondent's assertions, this Court has jurisdiction and Respondent's claims are related to plan administration and plan interpretation. This Court has jurisdiction because the Michigan Supreme Court's decision controls the scope of ERISA preemption by conditioning preemption not on whether the claim is related to plan administration or plan interpretation, but rather upon whether the decision of the fiduciaries was correct. As discussed in detail below, the Court has jurisdiction because the Michigan Supreme Court's incorrect interpretation of ERISA preemption would "seriously erode" federal policy by allowing review under state law of ERISA plan administration and subjecting the fiduciaries of the plan to burdensome litigation under conflicting standards. Further, under the correct test, Respondent's claims are preempted because the claims on their face relate to plan administration and plan interpretation.

1. This Court Has Jurisdiction Under 28 U.S.C. § 1257(a).

Respondent asserts that this Court lacks jurisdiction because it alleges that no reviewable "[f]inal judgment or decree" has been entered because the Michigan Supreme Court remanded the case for further proceedings. However, a close examination of the Michigan Supreme Court's decision leads to the conclusion that it constitutes a final judgment. This is so because the decision equates preemption with the correctness of the fiduciaries' action under ERISA, and thus requires the fiduciaries to litigate the correctness of their decision in state court under the guise (and under the conflicting standards) of state law.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029 (1975), this Court recognized that a judgment may be considered final even though further state proceedings are contemplated:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision *might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83, 95 S. Ct. at 1040 (emphasis added). In applying the test laid out in *Cox*, the Court has held that the denial of a preemption defense warrants immediate review. For example, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172 (1983), the Court found that it had jurisdiction where the Kentucky Court of Appeals found that state law misrepresentation and breach of contract claims were not preempted by the NLRA. Quoting *Cox*, the Court found that permitting the state court action to go forward would involve a serious risk of eroding the federal statutory policy of allowing the NLRB to resolve claims concerning the subject matter at issue. 463 U.S. at 497 n.5, 103 S. Ct. at 3176 n.5. Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704 (1988), once against relying upon *Cox*, the Court held that the state court's rejection of a federal preemption defense concerning a workers' compensation award warranted immediate review. In finding that federal policy

would be seriously eroded by letting the action go forward, the Court reasoned that further proceedings would seriously erode federal policy because the state court decision "sanction[ed] direct state regulation" which would interfere with the operation of federal nuclear facilities. 486 U.S. at 179-80, 108 S. Ct. at 1709.

Respondent argues that *Cox* does not apply because here, unlike in *Cox*, the Michigan Supreme Court's decision recites that the Court was not explicitly resolving the preemption issue or finding the preemption defense invalid. However, the Michigan Supreme Court's decision did decide the scope of the preemption defense. It stated:

> it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries activities were protected under ERISA's preemption provisions.

(App. B at 4a.) According to the Michigan Supreme Court, the relevant test for preemption is not the relationship between the claim and plan administration, but whether the fiduciaries made the correct benefit determination. In other words, if the former employees were "eligible to self-contribute," that is, if the fiduciaries' communication was a *correct* interpretation of the plan, then the Respondent's claims are preempted. However, if the former employees were not "eligible to self-contribute," that is, if the fiduciaries' communication was an incorrect interpretation of the plan, then the claims are not preempted.

Thus, in further proceedings, the Michigan Supreme Court may find the claims are preempted, but by finding that the fiduciaries' interpretation of the plan was correct. However, this would not change the Michigan Supreme Court's ruling that preemption is determined by the correctness of the decision rather than the relationship of the claim to the administration of the plan, a ruling that will survive regardless of

the outcome of further proceedings. Further, the decision would be unreviewable since the Petitioners would have prevailed. This would "seriously erode federal policy" since it would expose ERISA fiduciaries to varying state law standards (as well as the burdens of state court litigation) in contravention of the entire purpose behind ERISA preemption. As stated by this Court, Congress created ERISA preemption:

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. . . . Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S. Ct. 478, 484 (1990) (citations omitted). The Michigan Supreme Court's decision that the application of preemption depends on whether the decision made by the fiduciaries was correct under the terms of the plan eviscerates ERISA preemption. Under these circumstances, the decision constitutes a final judgment within the meaning of 28 U.S.C. § 1257(a).

2. The Michigan Supreme Court's Decision Conflicts with the Decisions of this Court and with Decisions of the Courts of Appeals.

Respondent argues that this Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004), does not conflict with the Michigan Supreme Court's decision because *Aetna Health* dealt with complete preemption where-

as this case involves conflict preemption. In making this argument, Respondent fails to acknowledge the reasoning which led to the Court's holding that the claims in *Aetna Health* were preempted. Instead, Respondent argues that it is attempting to enforce an independent duty imposed under state law and is not seeking to challenge a benefit determination. However, this precise argument was rejected in *Aetna Health*:

> Because this duty of ordinary care arises independently of any duty imposed by ERISA or the plan terms, the argument goes, any civil action to enforce this duty is not within the scope of the ERISA civil enforcement mechanism.
>
> The duties imposed by the THCLA in the context of these cases, however, do not arise independently of ERISA or the plan terms. . . . [I]f a managed care entity correctly concluded that, under the terms of the relevant plan, a particular treatment was not covered, the managed care entity's denial of coverage would not be a proximate cause of any injuries arising from the denial. Rather, the failure of the plan itself to cover the requested treatment would be the proximate cause. . . .
>
> Thus, interpretation of the terms of respondents' benefit plans forms an essential part of their THCLA claim, and THCLA liability *would exist here only because of petitioners' administration of ERISA-regulated benefit plans*. Petitioners' potential liability under the THCLA in these cases, then, derives entirely from the particular rights and obligations established by the benefit plans.

542 U.S. at ___, 124 S. Ct. at 2497-98 (citations omitted) (emphasis added).

As the reasoning indicates, the question is not whether state law imposes a legal duty which determines the preemption question, but rather the relationship between the legal duty and plan administration. The claim in *Aetna Health* would not have existed but for the plan administrator's interpretation and denial of an ERISA benefit claim. So too, in this case, the

Respondent's claims would not exist but for the fact that the fiduciaries made a benefit determination regarding the ability of the participants to make self-contributions and communicated that decision to the participants. The fact that, according to Respondent, the decision was incorrect, or that it was allegedly motivated by "union-related or competitive animus" (Response, p. 15), does not change the fact that the claim is based upon, and related to, actions taken in administering the plan.

It is the *relationship* between the claims and plan administration that determines whether the claims are preempted. This explains why Respondent's reliance on *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S. Ct. 2182 (1988), is misplaced. Respondent relies on *Mackey* for the proposition that "run-of-the-mill" claims against ERISA plans, including tort claims, are not preempted. But the types of claims listed in *Mackey* as "run-of-the-mill" claims, such as unpaid rent or failure to pay creditors, highlights that those claims have nothing to do with the administration of the plan. Here, in contrast, the claims are based upon core issues of plan administration—making benefit determinations and communicating those determinations to participants. In the Michigan Supreme Court's view, the preemption analysis turns on whether the employees in question were "eligible" to self-contribute. But determining whether the employees were "eligible" requires interpreting the plan. Thus, under the Michigan Supreme Court's reasoning, if the benefit determination is correct, the claims are preempted, but if the benefit determinations are incorrect, the claims are not preempted, and the fiduciaries may be liable under state law. Respondent seems to suggest an even more extreme standard whereby the claims are not preempted as long as the plaintiff alleges an improper motivation, thus potentially exposing fiduciaries to liability based upon state law even if the benefit determination is correct.

Respondent's attempt to harmonize the Michigan Supreme Court's decision with the decisions of the various Courts of

Appeals actually demonstrates the distinction between claims based upon conduct involving core plan administrator functions, and claims based upon unrelated conduct. As discussed below, these cases highlight that it is the relationship between the claims and plan administration, not the label placed on the claim or the identity of the parties, that determines whether the claim is preempted. For example, in *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186 (11th Cir. 1997) (*per curiam*), the plaintiff alleged that a claim for tortious interference with contract was not preempted because the defendant insurance company was not the plan administrator. In finding the claim preempted, the court reasoned that it was not the relationship between the parties, but rather the relationship between the claim and plan administration that controlled. 114 F.3d at 188. *Garren* rejects the premise advanced by Respondent that its claims are not preempted because Respondent is "an outsider to ERISA's regulatory framework." (Response, p. 14.)

Respondent tries to distinguish *Mayeaux v. Louisiana Health Serv. & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), by arguing that in *Mayeaux* the intentional interference with contract claim was found to be preempted because the doctor alleging the claim was trying to "stand in the shoes" of the participants. (Response, p. 24.) However, *Mayeaux* did not base its decision on the fact that the doctor was trying to assert a claim for denial of coverage as Respondent contends, but rather because allowing the doctor to assert a state law claim based upon the plan administrator's conduct in deciding benefit claims "would undoubtedly jeopardize the relationships among the traditional ERISA entities of which the treating physician is not one. These are the sort of claims that go to the very heart of the ERISA administrative process." 376 F.3d at 433. As in *Mayeaux*, Respondent seeks to impose liability on the fiduciaries for their actions in interpreting the plan to not allow self-contributions in the situation at issue, and for communicating that decision to the participants. The

relationship between the plan fiduciaries and the participants in making benefit determinations is, as stated in *Mayeaux*, the "very heart" of plan administration. It does not take much imagination to imagine the disabling effect on plan fiduciaries if every time they made a benefit determination and communicated that determination to the participants, they could be held liable to a third-party under state law.

Indeed, the cases relied upon by Respondent to demonstrate that the Michigan Supreme Court's decision is consistent with the decisions of the Courts of Appeals actually demonstrates the opposite. For example, in *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974 (9th Cir. 2001), the plaintiff alleged that the plan had hired an investigator to elicit information about the plaintiff's employment status by falsely claiming to be a bank loan officer; that the investigator attempted to gain personal information from neighbors and acquaintances by claiming the plaintiff was seeking to coach a basketball team; and that the investigator had obtained personal credit card information and travel itineraries by falsely impersonating the plaintiff. 269 F.3d at 979-80. In holding that the claim was not preempted by ERISA, the Ninth Circuit noted that the plaintiff's "damages for invasion of privacy remain whether or not UNUM ultimately pays his claim. His tort claim does not depend on or derive from his claim for benefits in any meaningful way." 269 F.3d at 983. Further, the Court stated that Congress' intent in creating ERISA preemption "was not to provide ERISA administrators with blanket immunity from garden variety torts which only peripherally impact daily plan administration." 269 F.3d at 984.

Here, in contrast, the Michigan Supreme Court's holding requires a determination of whether the participants were eligible under the terms of the plan to make self-contributions. The Respondent's claim is dependent upon showing that the determination under the plan (and the communication of the determination) was incorrect. Yet the dependence of

Respondent's claim upon the incorrectness of the determination is exactly the type of claim that *Aetna Health* determined was preempted by ERISA. There is no imaginable way that benefit determinations and the communication of the same can be considered peripheral to plan administration. Indeed, making benefit determinations and communicating those determinations is the core of plan administration.

Similarly, in *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002), the plaintiff alleged that the plan administrator "solicited and disseminated [plaintiff's] private medical information in order to assist [the employer] in its effort to declare [plaintiff] a 'direct threat' to her coworkers so that she could be fired." 292 F.3d at 186. In finding that the plaintiff's claims could not be dismissed on preemption grounds at the motion to dismiss stage, the Fourth Circuit stated:

> If [the plan administrator] obtained [plaintiff's] medical information in the course of processing a benefits claim or in the course of performing *any* of its administrative duties un der the plan, these claims would be "related to" the ERISA plan under § 514 and would therefore be preempted.

292 F.3d at 188. However, the Fourth Circuit found that it could not determine whether the claims were preempted because "it is not apparent from [plaintiff's] complaint that the conduct charged had anything to do with administering the employee benefits plan." 292 F.3d at 188.

In this case, the Respondent's complaint *does* indicate that the claim has to do with administering the plan. For example, the complaint alleges that representatives of Central States met with participants to describe how employment with C.C. Mid West would affect their rights under Central States' plan. (Complaint, ¶ 24.) The complaint alleged that Central States wrote to the participants to advise them about benefit determinations and the letter encouraged the participants to contact Central States to "determine how this will affect your benefit

status. . . ." (Complaint, ¶ 25.) Further, the letter attached to the complaint as an exhibit states:

> The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period of up to five (5) years provided that self-contributions will not be accepted for any period during which a participant is performing work for any company affiliated with either U.S. Truck Company, Inc. or CenTra, Inc.

(Complaint, Ex. A.) Finally, based upon these allegations, Respondent's complaint challenged the fiduciaries' "refusal to accept self-contributions from owner-operators." (Complaint, ¶ 30.) Thus, in contrast to the complaint in *Darcangelo*, the complaint in this case makes it clear that the challenged conduct occurred in the performance of administrative duties under the plan. Therefore, under *Darcangelo*, the claim would be preempted.

Finally, in *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005), an employer brought an action against the record-keeper of various benefit plans alleging a breach of contract claim. In finding the claim not preempted, the Sixth Circuit noted that the record-keeper "does not serve as a fiduciary" to the plans. 399 F.3d at 700. The Sixth Circuit found that the record-keeper was not a "[t]raditional ERISA plan entit[y]" such as the plan, the employer, the fiduciaries, and the beneficiaries. 399 F.3d at 700. Here, in contrast, the Petitioners are plan fiduciaries, and they are being sued for their actions in making a benefit determination, and communicating that decision to the beneficiaries. Thus, *Penny/Ohlmann/Nieman*, like the other cases cited by Respondent, does not support its position, and in fact highlights that claims involving benefit determinations are preempted.

CONCLUSION

For the reasons stated, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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